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Supreme Court of the United States

OCTOBER TERM, 1964

No. 487

ARTHUR E. HARRIS,
Petitioner

versus

WILLIAM F. WALKER, JR. et al.,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case, and, in support of their petition, respectfully show:

Opinions Below and Jurisdiction

The original opinion of the District Court in petitioner's favor is reported at 216 FS 176. The supplemental opinion of the District Court has not been reported. The opinion of the Court of Appeals, reversing the District Court, has not been reported.

The judgment of the Court of Appeals is dated June 18, 1964, and was entered the same date. Rehearing was denied on July 17, 1964. Jurisdiction of this Court lies under 28 USC 1254(1).

Question Presented

Whether a small tug may be condemned as unseaworthy, and denied limitation of liability on that ground, (1) because, although admittedly sound structurally, she failed to weather a storm of unforecast intensity encountered in waters customarily navigated by tugs of like size and class, and (2) because she was not in compliance with Coast Guard regulations, specifying type and security of equipment in lifeboats, which are by their own terms explicitly inapplicable to vessels of her size and tonnage, and with which comparable vessels plying the same waters are not required to comply.

The Court of Appeals' holding of unseaworthiness in this case, despite the vessel's admitted equivalence in soundness and equipment to "similar vessels in similar service", conflicts directly with that test of seaworthiness applied by the Court of Appeals for the Second Circuit in *Nuzzo vs Rederi A/S Wallenco*, 304 F2d 506 (1962), and *Poignant vs United States*, 225 F2d 595 (1955).

Statute Involved

46 USC 183: (a) The liability of the owner of any vessel, whether American or foreign, for any embezzle-

ment, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, tow boats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R. S. § 4283; amended by Acts of August 29, 1935, c. 804, § 1, 49 Stat. 960, and June 5, 1936, c. 521, § 1, 49 Stat. 1479.

Statement of the Case

Petitioner's tug *Ralph E. Havens* (48 gross tons, 67 feet long, R 231, Petitioner's Exhibit C) sank in a sudden strong gale, 15 to 20 miles from shore, while proceeding without tow in the Gulf of Mexico between Seahorse Whistle Buoy, off Cedar Keys on the west coast of Florida, and Carrabelle, Florida. R 546-56, 567.

Her lifeboat survived the storm, but the provisions in the boat were lost in launching it, and two of her four crew members died during the three-and-a-half days required to bring the lifeboat to shore. R 556-66.

Petitioner filed this proceeding, under the Limited-Liability Act, for exoneration from or limitation of, liability. Representatives of the two deceased crewmen, and one surviving crewman allegedly injured in the casualty, filed claims and answers denying petitioner's right to exoneration or limitation.

The District Judge found, and this finding was accepted by the Court of Appeals, that at the time of the sinking the tug and her equipment were structurally sound. R 156-58, 789. The District Judge found further, and this finding was also accepted by the Court of Appeals, that the weather forecasts available to the tug's owner and crew did not predict the violence of the storm. R 154-55, 790-91.

The record shows without dispute that tugs of the size and class of the *Havens* customarily cross the Gulf on the route on which the *Havens* was lost, and depend on the accuracy of weather forecasts to enable them to reach shore or safe waters in event of violent weather. R 168, 207, 254-56, 750-51.

On this record the District Court entered a decree exonerating petitioner from liability for the sinking. The Court of Appeals reversed, and denied petitioner both exoneration from, and limitation of, liability.

The grounds for the appellate Court's holding were two: first, that the *Havens* was *ipso facto* unseaworthy, despite her admitted structural soundness and fitness comparable to other vessels in the same trade, because she did not withstand weather in a range of violence which could be expected in the Gulf (R 802-3, Appendix, pages 26-27 below), even though such weather had not been forecast; and second, that the *Havens* was further unseaworthy in that her lifeboat equipment did not include a mast and sail, and that the lifeboat provisions were not adequately secured against loss in launching (R 809, Appendix, pages 33-34 below), although the Coast Guard requirements on which this holding was based are, by their own express provision, not applicable to tugs of the *Havens'* size and class (46 CFR 2.01-7(a), 24.05-1(a), 70.05-1(a), 90.05-1(a), and following tables), and are not customarily met by such tugs (R 226).

Argument

By condemning the *Havens* as unseaworthy merely because she failed to withstand a storm of unforecast intensity, despite the fact that she was structurally sound and was in waters customarily traveled by comparable vessels, the Court of Appeals has rendered a decision in direct conflict with decisions of this Court and of the Court of Appeals for the Second Circuit.

In *Boudoin vs Lykes Bros. S. S. Co.*, this Court held: "The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that

'the vessel is reasonably fit to carry the cargo.' ". 348 US 336, 339 (1955).

In *Mitchell vs Trawler Racer*, this Court held similarly: "The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 US 539, 550 (1960).

The Second Circuit has expressly related the issue of seaworthiness of a given vessel to "the usual and customary standards of the calling"; and, with specific reference to adequacy of equipment, to the question "whether the vessel had been provided with the equipment usually found in other vessels". *Nuzzo vs Rederi A/S Wallenco*, 304 F2d 506, 510 (1962). And see *Poignant vs United States*, 225 F2d 595, 598 (CA 2-1955), holding that a given condition does not render a vessel unseaworthy "if even so the vessel was as fit for service as similar vessels in similar service".

By direct contrast, the Fifth Circuit expressly and specifically rejected, in the case at bar, the proposition (stated in the District Court's opinion as the basis for its finding of seaworthiness) that "any craft in sound condition is seaworthy . . . if it can withstand all of the forces of sea and wind which a sound vessel of the same size and characteristics could withstand". R 796, Appendix, page 20 below.

The Fifth Circuit's condemnation of the *Havens* for lifeboat deficiency conflicts equally with the Second

Circuit's decisions, since it was reached without regard for the fact that other tugs of the *Havens'* class customarily ply the Gulf without meeting the Coast Guard's lifeboat rules, not applicable to them.

In addition, the lifeboat holding raises the further serious question whether a small tug may, as a prerequisite to limitation of liability, be held judicially to standards of lifeboat safety more strict than those which Congress and the Coast Guard have seen fit to impose. The Congressional and administrative exemption of tugs of this class from the lifeboat rules was no mere oversight; it was a deliberate expression of national policy, evidenced by formal declaration. Senate Report 1321, 74th Congress, 1st Session (1935).[1]

It would appear that the Limited-Liability Act and the Congressional exemption of small tugs from the inspection and licensing rules, as related expressions of a legislative policy of encouragement to small shipping, should be construed and applied *in pari materia* to effectuate that policy, not fragmented by judicial fiat to defeat it. Crawford, *Statutory Construction* (1940), section 231.[2]

Even in the absence of statute, this Court itself has refrained from extending maritime rules to cases to

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[1] "It is manifest that Congress carefully considered the application of existing laws and decided to what extent its field of regulation should be widened. Congress decided to extend its regulation as to motor-driven vessels only to those of the specified (larger) class." *Kelly vs Washington*, 302 US 1, 7 (1937).

[2] "Judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting, in *Southern Pacific Co. vs Jensen*, 244 US 205, 221 (1917).

which they have not heretofore applied, on the ground that changes in long-standing rules of conduct should be made by Congress, not the Courts. *Halcyon Lines vs Haenn Ship Corporation*, 342 US 282, 285-86 (1952).[3]

And in *New York Times Company vs Sullivan*, this Court made it clear that exemptive rules of criminal application should apply with equal force when civil liabilities far outweighing possible criminal penalties are involved. 376 US 254, 277-78 (1964).

A final question—not presented by this petition, but which will be argued in this Court if certiorari is granted—is the extent to which the Fifth Circuit's holdings, even if they should be affirmed by this Court, should be so applied as to visit on a law-abiding small-tug operator the crushing impact of retroactive exposure to liability heavily in excess of the protective insurance which he limited to the value of his vessel (R 52, 56), in justifiable reliance on the express exemption deliberately granted him by Congress and the Coast Guard from the onerous rules applicable until now only to larger vessels.

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[3] "Congress has already enacted much legislation in the area of maritime personal injuries . . . Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made." And see *Toolson vs New York Yankees*, 346 US 356 (1953).

Courts have increasingly recognized that only prospective effect should be given a decision changing the law to create new liability where none had existed before, especially in cases in which protective insurance adequate to cover the new liability was pretermitted in justifiable reliance on the former rules.[4]

After some hesitation,[5] this Court has itself applied this principle in taking care to overrule a prior decision "in a manner that will not prejudice those who might have relied on it". *James vs United States*, 366 US 213, 221 (1961). The principle would seem equally applicable in the circumstances of the case at bar; but was given no effect by the Fifth Circuit in this case, although urged upon it by application for rehearing.

Conclusion

It is respectfully submitted that, in the interest of maintaining needed national uniformity in an important

[4] See Comment: *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale Law Journal 907, 921 (1962); Note: *Limitation of Judicial Decisions to Prospective Operation*, 46 Iowa Law Review 600, 605 (1961). And see *Durham vs United States*, 214 F2d 862, 874 (CA DC-1954), affirming the "inherent right" of federal courts to announce new rules prospectively. *Cf. United States vs Walker*, 323 F2d 11 (CA 5-1963), cert. gr. *sub nom. Linkletter vs Walker*, 377 US 930.

[5] This Court sustained the right of state courts to change the law prospectively in *Great Northern Railway vs Sunburst Co.*, 287 US 358 (1932); but declined to do so itself, over dissents calling for prospective effect only to avoid prejudice to innocent parties relying on prior law, in *Mosser vs Darrow*, 341 US 267, 276 (1951) (Black, J., dissenting), and *Massey Motors vs United States*, 364 US 92, 121 (1960) (Douglas, J., dissenting).

field of maritime law, this Court should resolve the inter-Circuit conflict at issue, recognize with finality the standards by which small vessels expressly exempted from the onerous Coast Guard requirements are to be judged in determining seaworthiness, and obviate the unjust result reached below, by granting certiorari herein as prayed.

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August, 1964

APPENDIX.

Opinion of the Court of Appeals

BROWN, Circuit Judge: The District Court held that a 52-year-old wooden inland tug which sank at sea in wind and weather which, although rough, she ought to have anticipated, was nonetheless seaworthy. Consequently, the Court granted the vessel owner's right to limit liability, 46 USCA §§183-189, and, for double measure, held the owner free from negligence. This decision encompassed also the ruling that the lifeboat was sufficient, that is, seaworthy, even though none of the essential gear or supplies was tied down or stowed to prevent accidental loss when the lifeboat capsized in the effort to launch it after the manila fall in a boat davit parted apparently from old age. By this appeal the two survivors and the estates of two who did not complete the harrowing 110 hours in the lifeboat attack these actions. We reverse and remand for computation of damages.

All counsel in briefs and argument seem preoccupied with a question whether the Judge erred in declining to hold that the tug was unseaworthy (with the privity and knowledge of the owner) because of (a) deficient pumps and (b) the inadequacy of the glass in the sash-type windows in the deckhousing. As we approach the case, all of these things are now unessential since on basic principles, the evidence as a matter of law compelled the conclusion of negligent unseaworthiness causing the deaths and injuries. This also greatly simplifies our discussion of the evidence. As a preface

we emphasize that while our result is contrary to that of the District Judge, we reach it without rejecting as clearly erroneous fact findings made below. *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, 1954 AMC 1999; *Roberts v. Echternach*, 5 Cir., 1962, 302 F.2d 370, 373; *Compania Anonima Venezolana De Nav. v. A. J. Perez Exp. Co.*, 5 Cir., 1962, 303 F.2d 692, 694.

The wooden tug RALPH E. HAVENS was built in 1905. She was 66.6 feet in length with a beam of 18.6 feet, a depth of 5.7 feet, and loaded draft of 7 feet aft with a freeboard of 18 inches. She was owned by petitioner-appellee Harris who, until relieved by Captain Wickizer a couple of days before, doubled in harness as Master. There is thus no real problem about privity and knowledge.

The RALPH E. HAVENS at the time of the casualty was homeward bound after delivering a tow on the East Coast. Crossing Florida inland waters, she came out into the Gulf of Mexico near Fort Myers. From there she planned to parallel the West Coast of Florida until off Seahorse Reef whistle buoy at which time she would lay her course for Carrabelle, Florida, on the south coast of the Florida Peninsula approximately 40 miles east of Apalachicola where she would return to inside waters. When she sunk about 3:00 a.m. Sunday, December 8, 1957, she was approximately 12 to 15 miles from Carrabelle.

The Tug departed off Fort Myers at 8:00 p.m. Saturday, December 7, 1957. Aboard were Captain Wickizer, Mate Sam Kelly, and deckhands Walker and White-

head. Everything seemed to be in good order, and the Court was warranted in crediting the testimony that the weather reports were not then unfavorable.[1] She passed off of Edgemont Key the following morning at 6:00 a.m. December 8. This put her substantially abeam Tampa Bay. At 7:00 a.m. Sunday, December 8, she was about three to four miles off shore just above St. Petersburg. Weather changes, notably northwest winds, were predicted.[2] She passed abeam Seahorse whistle buoy at 5:00 p.m. Sunday, December 8. Northwestern winds were predicted in the noon forecast[3] and again in the evening[4] at which time (7:00

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[1] Weather reports for the East Gulf are prepared and circulated from the Miami Weather Bureau office. The closest forecast in the record is that of Sunday, December 8, 1957, 1:30 a.m.:

"Moderate west to northwest winds extreme north portion and moderate to fresh south to southwest winds elsewhere today and tonight except becoming moderate west to northwest central portion tonight. Monday winds becoming mostly fresh northwesterly. Considerable cloudiness with occasional rain north portion and partly cloudy south portion today and tonight. Monday clearing except partly cloudy with scattered showers extreme south portion."

[2] The forecast of December 8, 1957, 7:30 a.m. was:

"Moderate variable winds north portion and moderate southeast to south winds south portion shifting to fresh northwest to north over north portion tonight. Monday fresh northwest to north winds over north portion and moderate southerly shifting to moderate to fresh northerly over south portion by late afternoon. Mostly cloudy with scattered showers clearing north portion Monday."

[3] Sunday, December 8, 1957, 1:30 p.m:

"Moderate occasionally fresh southwesterly winds over north portion shifting to mostly fresh northwesterly late tonight and Monday. Moderate variable mostly southerly winds over south portion shifting to mostly fresh northerly Monday afternoon. Considerable cloudiness with scattered showers clearing north portion Monday."

[4] Sunday, December 8, 1957, 7:30 p.m:

"Mostly fresh northwesterly winds north portion and moderate occasionally fresh southwest to west winds south portion Monday, becoming northwesterly during

p.m.) the Tug was about 25 miles off the mouth of the Suwannee River. Some time between 10:00 p.m. and midnight of Sunday, December 8, the winds became strong northwesterly. This was verified by the next forecast of 1:30 a.m. December 9, Monday.[3] At midnight of Sunday, December 8, her position was approximately 30 to 35 miles, and at the time of the 1:30 Advisory approximately 20 miles, southeast of Carrabelle. It is uncontradicted that at the time the wind and sea began kicking up, the closest port was Carrabelle, and no real complaint, as such, was made below or here that she should have turned tail for Tampa then over 100 miles away. The fact that she was yet so near and yet so far from a port of refuge, while not a fault as such, is nevertheless an important factor in evaluating her seaworthiness.

Whether the seas and wind became noticeably more severe closer to 10:00 p.m. than midnight, Sunday, December 8, as testified to by Walker does not really matter. It is uncontradicted that at least by midnight, the wind and sea was increasing. Running into the northwesterly winds and sea, the Tug began to pound heavily and Kelly, the mate on watch, awakened Captain Wickizer about 1:30 a.m. When Captain Wickizer took over the wheel, Kelly went to the engine room

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afternoon. Considerable cloudiness with scattered showers central and south portions and over extreme north portion early Monday."

Monday, December 9, 1957, 1:30 a.m:

"Fresh northwesterly winds north portion and moderate occasionally fresh west to northwest winds south portion today becoming fresh northwest to north tonight and Tuesday. Considerable cloudiness with scattered showers south portion today, becoming partly cloudy tonight and Tuesday."

because difficulty with the discharge pumps was being experienced. Captain Wickizer was faced obviously with a hard choice: To head on? To turn tail? To hold speed? To slow down? His decision was to head on but at reduced speed knowing that there were risks in this course. If speed were reduced too much, the Tug would fall off under wind and sea with danger of capsizing as she broached. On the other hand, increasing speed to offset this contingency presented the possibility that continuous pounding would open up her seams so that she would sink while driving ahead.

All were conscious, of course, of their great peril. With the Tug continuing ahead at reduced speed, efforts were made by others to increase the output of the bilge discharge pumps, the auxiliary pump, and two portable pumps since the water was gaining.[6] During these efforts, the Tug lost most of her steerage way, her bow fell off to starboard, a sea struck her port bow, she broached and wallowed in the trough of the seas. Efforts to head her up were unsuccessful, and two large waves piled over the port side breaking out the windows of the deckhouse. With the windows out, the Tug took in dangerous quantities of water, and it was evident that she would soon sink. It was plain that they would have to abandon ship. Captain Wickizer stayed at the wheel until the Tug's "waist"

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[6] The trial court found no negligence or unseaworthiness in the sufficiency of the pumps, the strainers, the inability to start the gasoline pumps, and the like. We may assume, *arguendo*, this to be supported. Nevertheless, there is no real dispute that the water was gaining, the pumps were not then effective, and the portable pumps would not operate. The situation was certainly "a condition" if not a "cause."

was nearly awash. In the meantime, Walker and Kelly had attempted to launch the lifeboat. According to Walker's testimony, while Kelly was letting out one of the falls from a lifeboat davit, it parted. This caused claimed injuries to Kelly and Walker insisted that this made it impossible to launch the boat by the davits. The District Court did not expressly discredit this part of Walker's story, but did find that Captain Wickizer instructed the men to wait "until the water reached their feet" when they were to jump "into the lifeboat" then resting on top of the deckhouse. The Judge found that "as they jumped, the HAVENS sank, and the after davit swung out, caught the gunwale of the lifeboat and capsized it." In any event, whether this manner of launching was due to a decision by the Captain, as the Court impliedly found, or from the parting of the boat fall as claimed by Walker, the lifeboat capsized at launching, and whatever was in it was washed away before the crew could right the boat.

Thus did the four, then scarcely 12 miles from shore, set out in the black of night during a storm without water breaker, food, tiller, sails or bailer. All they had was three oars. Lights visible from ashore and the short distance were beguiling. It was not until nearly four days later that Captain Wickizer brought the lifeboat ashore near Bayport, Florida, at about 5:00 p.m. on Thursday, December 12. The lifeboat had traveled approximately 140 miles to the southeast. The Captain and Walker were able to stagger to a farmhouse. With this help, Wickizer and Walker got to a hospital. But it was too late for Kelly and White-

head. Each, unable to endure this experience in the open lifeboat, died while still at sea.

From reading this narrative account, one would suppose that the RALPH E. HAVENS had been overcome by tempestuous forces of the cruel sea which defy even the most prudent efforts. But on the testimony most favorable to the shipowner, it was no such case. Captain Wickizer fixed the force of the winds at 33 to 36 miles per hour, and the seas from 5 to 12 feet in height. The holding of the Court is that a vessel incapable of withstanding winds of this relatively low velocity and seas of limited height[7] is nevertheless seaworthy; that is, fit in the eyes of the law for the life and limb of those who go down to sea in ships. Almost instinctively one would think that this result could be justified on only one of two possibilities. The first would be that while these natural forces were relatively mild in contrast to, say, the North Atlantic in the winter, they were yet so severe and unpredictable for this time and place that the prudent shipowner had no reason to anticipate their occurrence. The second would be that, assuming the duty to anticipate seas and wind of this kind, some new and wholly unpredictable act intervened which made it reasonably impossible for the crew to extricate the ship from her expected peril. Neither of these conditions is established by the record and, when

[7] On the Beaufort scale referred to by the Court below and in briefs here, winds at force 7 (32 to 38 miles per hour) are described as a "moderate gale" with accompanying seas described as "very rough" with waves 8 to 12 feet in height; force 8 (winds 39-46 m.p.h.) are called "fresh gale" with seas similar to force 7.

carefully analyzed, we do not think the Judge either held, or intended to hold, that they were. What, and all, the District Judge did was to create an entirely new standard of seaworthiness in which "reasonable fitness" is measured not in terms of the perils and forces to which crew, passengers, cargo, or tow are to be exposed, but rather in terms of the capacity of a particular craft to withstand such forces. By a process of circular reasoning, any craft in sound condition is seaworthy under this analysis if it can withstand all of the forces of sea and wind which a sound vessel of the same size and characteristics could withstand.

Thus the Judge in his initial opinion had this to say: "It is true that when a storm is relied upon to explain the sinking of a vessel, the storm must be shown to have been of extraordinary intensity. Sabine Towing Co. v. Brennan, 5 Cir., 1934, 72 F.2d 490, 493. However, what constitutes 'extraordinary intensity' is a relative matter. The Supreme Court pointed out in Compania de Navigation Interior, S.A. v. Firemen's Fund Insurance Co., 1928, 277 U.S. 66, that a large oceangoing vessel encountering what to it would be a light breeze could well be an exceedingly dangerous gale to a small, inland, wooden tug. Here we had a small, inland, wooden tug that encountered waves of 12 to 13 feet, which must surely constitute a storm of 'extraordinary intensity' to such a vessel." In re *Harris*, E.D.La., 1963, 216 F.Supp. 176, 178-79. In response to the petition for rehearing, the Judge, emphasizing the absence of any small craft warnings and the Captain's

"right to assume that he would not encounter weather dangerous to the safety of his vessel," and the shortness of a 12-hour run from sea to a safe port[8] made his basic ruling even clearer. It was, he stated, "the unexpected and unforecasted encounter with 12-to-13-foot seas" which sank the Tug. "So," he went on, "unless all Gulf crossings by inland tugs at this point (Seahorse Reef buoy to Carrabelle, Florida) are prohibited, the captains of such vessels can only proceed on the basis of information available to them, and to do so is not negligence where the forecast weather is good, and to be unable to weather 12 to 13-foot seas under the circumstances here does not render the vessel unseaworthy."

Of course, no such standard is either supported by the law or this record. Seaworthiness, as that term has been defined and redefined, is reasonable fitness to perform or do the work at hand. *Saunders v. Pool Shipping Co.*, 5 Cir., 1956, 235 F.2d 729, 1956 AMC 1351; *Ionion Steamship Co. v. United Distillers of America, Inc.*, 5 Cir., 1956, 236 F.2d 78, 1956 AMC 1750; *Tropical Marine Products v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946; *Vega v. The Malula*, 5 Cir., 1961, 291 F.2d 415, 1961 AMC 1698; *Delta Eng'r v. Scott*, 5 Cir., 1963, 322 F.2d 11; *Texas Menhaden Co. v. Johnson*, 5 Cir., 1964, ... F.2d ...., ..., nn. 1, 2 [No. 20713, May 13, 1964]. The subsidiary questions

[8] "The HAVENS made this same trip in safety before, apparently without incident. No small craft warnings were forecasted and the captain had every right to assume that he would not encounter weather dangerous to the safety of his vessel. The trip would not require the HAVENS to be more than a 12-hour run to a safe port."

leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been. *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 AMC 1503.

The question in this case boils down then to whether winds and seas of the kind actually encountered at this fateful moment were reasonably to be anticipated. On this record there cannot be any doubt. Indeed, it comes from the shipowner's own case and from its most professionally distinguished witness, Captain Bachrach, licensed master mariner and experienced marine surveyor who had approved the vessel for insurance purposes in 1956 including "occasional" trips across the upper corner of the Gulf if towing not more than one barge. As would an Elder Brethren of Trinity House, *Calmar Steamship Corp. v. Scott*, 1953, 345 U.S. 427, 432, 73 S.Ct. 739, 97 L.Ed. 1125, 1953 AMC 952; *United Geophysical Co. v. Vela*, 5 Cir., 1956, 231 F.2d 816, 819, 1956 AMC 745, he supplied not only irrefutable factual evidence, but informed, professional expertise on vessel operation with the blending of both into an appropriate principle or conclusion of law. Thus, in connection with the studies he testified he had made to enable him to approve tows in these waters, he was

asked, "Did you learn that the 'northwesters' come up rather suddenly with a considerable amount of violence?" To that he answered, "That's correct. In fact, they usually all come up that way." This is in no way watered down by his other testimony that usually there will be some forecasted warning. Indeed, the warning he speaks about serves only to demonstrate, in his professional judgment, the intensity and severity of the seas and winds to be encountered and the necessity for turning tail for port without delay.[9] With a full awareness of the significance of the questions and the importance of the answers, Captain Bachrach then reduced the case to tangible and decisive terms:

> "Q. Now, any vessel operating in the Gulf of Mexico in this area therefore must be reasonably fit to stand these 'northwesters', is that not correct?
>
> "A. I would say so, yes.
>
> "Q. Any vessel that is going to put out from Fort Myers to Carrabelle has got to anticipate

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[9] Immediately following the testimony just quoted, he testified:

"Q. They come up quite suddenly, is that right?

"A. Yes, but they usually—usually there is a forecast on them, which you can get, but I will say this: A 'northwester' in the Gulf of Mexico can put out some strong winds.

"Q. There isn't anything unusual about a thirty-five mile an hour wind in connection with a 'northwester', is there?

"A. That's right.

"Q. That's routine, isn't it. Aren't winds of that velocity a common thing with a 'northwester'?

"A. Yes, I would say so, but you usually do have some warning, you are supposed to head for shelter, but they do come up quite frequently."

that sort of weather forecast, particularly in the latter part of the year, isn't that right?

"A. Well, you can say that, yes, just the same as for any vessel starting out with a tow from New Orleans through the Gulf of Mexico, because you are going to have those weather disturbances out in the gulf frequently that time of year.[10]

"Q. Isn't it true that any vessel operating in the Gulf of Mexico between Fort Myers and Carrabelle in the wintertime should be reasonably fit and suitable and overcome a 'northwester'? Isn't that right?

"A. That's correct, yes.

"Q. And if she cannot do so, sir, I take it, you could agree with me that she is not seaworthy? Would you answer that yes or no, sir?

"A. I agree."[11]

So do we, and so do other courts. Thus, in *R. T. Jones Lumber Cc. v. Roen Steamship Co.*, 2 Cir., 1959, 270 F.2d 456, 1960 AMC 46, the Court held that cargo damage resulting from seas 12 to 15 feet high and wind of 50 m.p.h. was not due to a peril of the sea

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[10] Captain Wickizer confirmed this testimony of Captain Bachrach:

"At the time of the year the Havens sank, a northwester is not uncommon?

"A. No, not uncommon."

[11] The crucial nature of these responses is highlighted by Captain Wickizer's testimony as to the cause of the sinking:

"Q. Do you think the failure of the pump had anything to do with the vessel sinking?

"A. No doubt that had some bearing on it, but the sea, I believe was the main thing."

in the light of supportable factual findings "that the storm was not an unusual event for Lake Erie in November, but one which could reasonably be anticipated and provided against." Similarly, in petition of *Moore-McCormick Lines, Inc.*, S.D.N.Y., 1958, 164 F.Supp. 198, 1958 AMC 1497, the Court rejected a defense based on winds of force 8, seas of 20 to 22 feet since "The weather * * *, though rough, was no worse than was common off Hatteras during October, so was to be expected on this voyage. A stable seaworthy vessel, properly navigated and managed, should have been able to survive in it." Rejecting a defense of a moderate gale of 30 knots, the Court in *Eastern Gas and Fuel Associates v. Martin Marine Transit Company*, 3 Cir., 1951, 190 F.2d 394, 1951 AMC 1518, referred to the "prevailing and, in our judgment, correct judicial view * * * expressed in the Manuel Arnus, S.D.N.Y., 1935, 1935 AMC 786, 792, 10 F.Supp. 729, 732: '* * * the weather must be irresistible, overwhelming, and extraordinary for the particular time of year to be a good exception. * * *'"

Nothing in the celebrated dicta[12] of the Wash Gray,[13] so heavily relied on by the District Court, is to the contrary. The problem in that case was not the standard of seaworthiness exacted by the law for the protection of life and limb of passengers or crew

[12] The Court stated: "What amounts to a light breeze, or a small swell, or a choppy sea, as logged for a large ocean-going steel vessel would be relatively, if logged for a little inland, wooden tug, with two or three feet of freeboard, an extremely dangerous gale and rough seas." 1928, 277 U.S. 66, 79, 48 S.Ct. 459, 72 L.Ed. 787, 1928 AMC 923.

[13] Compania de Navigacion v. Firemen's Fund Ins. Co., 1928, 277 U.S. 66, 48 S.Ct. 459, 72 L.Ed. 787, 1928 AMC 923.

members or the care and custody and delivery of cargo entrusted to a vessel. Rather, it was whether the damage sustained by the insured vessel was caused by a peril of the sea as defined in a private insurance contract between owner and underwriters. Complicating that case, too, was the admitted insufficiency—hence, unseaworthiness—of the Wash Gray to go outside. Notwithstanding this, the underwriters purposefully issued the insurance with full knowledge of, and acquiescence in, the proposed voyage, and exacted a higher premium therefor. So much is wrapped up in that kind of case, the nature of the assured's warranty of seaworthiness, if any, its extent and duration in point of time, and the like, that it is not safe to conclude that losses from a "peril of the sea" or those caused by "unseaworthiness" are always mutually exclusive. *Saskatchewan Government Ins. Office v. Spot Pack*, 5 Cir., 1957, 242 F.2d 385, 1957 AMC 655; *Tropical Marine Prod. v. Birmingham Fire Ins. Co.*, 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946. More important, insurance cases which turn on the law's quest for the contractors' intention[14] are poor analogies in assaying the "public" duties imposed by law on ships and shipowners for the protection of people and property.

This analysis brings us, therefore, to the application of the familiar doctrine, so often invoked where ves-

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[14] American Agric. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856, 860, 861 (concurring opinion); Saskatchewan Government Ins. Office v. Spot Pack, 5 Cir., 1957, 242 F.2d 385, 1957 AMC 655; Tropical Marine Prod. v. Birmingham Fire Ins. Co., 5 Cir., 1957, 247 F.2d 116, 1957 AMC 1946; Reliance Ins. Co. v. Yacht Escapade, 5 Cir., 1960, 280 F.2d 482, 1960 AMC .....

sels sink in calm waters,[15] that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of, unseaworthiness. Although not articulated in such terms, it is a sort of sea-going *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here.

It is true, of course, that the sudden increase in the northwester put tug and captain in a difficult spot. To head on or turn tail? To maintain or reduce speed? Risk pounding and leakage? Avoid pounding but risk broaching? It is equally true that the mortal blow came from the broaching which we may assume was the unavoidable consequence of the non-negligent decision to slow down. Aggravating these choices and the consequences of decision were the other characteristics of the Tug. This included such things as sash type windows with ordinary window glass panes. And so it did the pumps which, although claimed by the shipowner, and found by the Court, to be in good condition, were nevertheless unable to keep up with the intake of sea water. But none of these things or conditions was unknown, unexpected, or unpredictable. Indeed, it was just such things which made the Tug

[15] Tropical Marine Prod. v. Birmingham Fire Ins. Co., 5 Cir., 1957, 247 F.2d 116, 118, nn. 3, 4, 1957 AMC 1946, collects the cases.

reasonably unfit for these waters in this season. Forces and conditions which she had the duty of anticipating cannot amount to an intervening and new cause to excuse the disastrous result.

Nor does the absence of a small craft warning from the United States Weather Bureau afford any excuse. Although testimony indicates that some warning is often available, the record is overwhelming that northwesters can, and as happened here do, arise on short notice. The District Judge placed great emphasis upon the shipowner's contention that these voyages across the upper corner of the Gulf were short in time, generally close into shore, and never more than 12 hours from a port of refuge. But the 15-20 miles from the point of sinking to Carrabelle was much too much. And the 2-1/2 hours to make good this distance was more time than the Tug had. Indeed, to accept the shipowner's contention would be to hold that the Tug was entitled to 24 hours' notice of weather changes in the Gulf, a luxury nowhere supported by any evidence in this record other than the dubious one that providence, good fortune, wind, weather and tide had smiled on previous trips which had been safely made. Thus when passing abeam St. Petersburg about the time of the December 8, 1957, 7:30 a.m. forecast, note 2, *supra*, it was known that the Tug, 12 hours later (7:30 p.m.)[16]

[16] As of 7:30 p.m. Sunday, December 8, northwesterly winds had to be reckoned with. The forecast at noon, 1:30 p.m., see note 3, supra, predicted "mostly fresh northwesterly" winds "late tonight and Monday." This was renewed in the 7:30 p.m. forecast (see note 4, supra) predicting "mostly fresh northwesterly winds north portion." On U.S. Weather Bureau standards, the term "fresh" describes winds 19-24 m.p.h.

would be at the "point of no return" where, to continue on to Carrabelle, meant substantially another 12 hours at sea with alternative ports of refuge getting farther and farther away as she pressed on her NW course. There is no evidence in this record which would remotely support the conclusion that at this time and season, a small inland tug following this course could expect 24 hours' advance warning of northwesterly winds of a moderate velocity of 33-36 m.p.h. with wind-driven seas of 5 to 12 feet in height. The Tug therefore had to have the capabilities of withstanding winds and seas of that expected power which might arise during the last, but vital, 12-hour, 100-mile leg toward Carrabelle. The duty to furnish a seaworthy vessel is on the shipowner. That duty is neither lessened nor eliminated here by the absence of small craft warnings.

We think the Judge likewise erred as to the seaworthiness of the lifeboat.

Since it is argued that the nature of the equipment and the manner of its stowage is irrelevant if a lifeboat was not required, the first question is whether the law imposed a duty on the Tug to have a lifeboat aboard. The statute does not literally require it since the RALPH E. HAVENS was not a "steam vessel" but rather a motor vessel powered by diesel engine. There is no doubt that had the RALPH E. HAVENS been powered by steam, she would have met the literal re-

(Beaufort force 5), only slightly less than the winds estimated by Captain Wickizer to be 33-36 m.p.h. which by Weather Bureau standards are described as "strong" (Beaufort, force 7).

quirements of 46 USCA §481 which prescribes that "Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall be provided with such numbers of lifeboats, floats, rafts, life-preservers * * * as will best secure the safety of all persons on board such vessel in case of disaster * * *. And the commandant of the Coast Guard shall fix and determine, by rules and regulations, * * * the character of lifeboats, floats, rafts, life preservers * * * that shall be used on such vessels * * *."[17]

The 1954 statutory regulations are detailed and exacting concerning the equipment of every lifeboat and the manner of its stowage including, as a matter of special interest here, requirements for bailers, masts with a good sail and proper gear and minimum specified supplies of food and water in watertight recep-

[17] As amended August 30, 1954, §1(29), ch. 1076, 68 Stat. 968. As then enacted the statute included detailed regulations which were, in effect, prescribed as the "minimum requirements." The 1954 Amendment did repeal the earlier requirement that all regulations authorized by the section be sumbitted to Congress as soon as practicable after being adopted. See Legislative History, 1954 U.S. Code Cong. & Adm. News 35-39. Section 481 was substantially amended in 1959, subsequent to the date of this casualty. Public Law 86-244, §1, 73 Stat 475; see 1959 U.S. Code Cong. & Adm. News 2283. Statutory minimum regulations were deleted, but substantial civil penalties against the ship and shipowner, as well as the master, were prescribed. The effect is to invest more, not less, power in the Coast Guard by requiring the promulgation of "such rules and regulations as may be necessary for vessels subject to inspection and certification by the United States Coast Guard" with respect to, among other things, "(1) life saving equipment, including, but not limited to, the number, type, size, capacity, details of construction, methods of operation, stowage, maintenance, manning, use, testing, and inspecting of such equipment * * *."

tacles.[18] Even more important, the regulations require that "all loose equipment must be securely attached to the boat or pontoon raft to which it belongs."

Any statutory duty to provide a lifeboat turns on whether a motor powered tugboat is a "steam vessel" and if so, whether it is a "vessel subject to inspection." The first is taken care of by 46 USCA §361 which provides that "Every vessel subject to inspection propelled

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[18] These may conveniently be found at 46 USCA §481 at 171, 179-80 (1958) (volume containing §§251-681):

"First. The normal equipment of every boat shall consist of

"(a) A single banked complement of oars and two spare oars; one set and a half of thole pins or crutches; a boat hook.

"(b) Two plugs for each plug hole (plugs are not required when proper automatic valves are fitted); a bailer and a galvanized iron bucket.

"(c) A tiller or yoke and yoke lines.

"(d) Two hatchets.

"(e) A lamp filled with oil and trimmed.

"(f) A mast or masts with one good sail at least, and proper gear for each. (This does not apply to motor lifeboats or lifeboats on the Great Lakes or other inland waters.)

"(g) A suitable compass.

"Third. In addition, every boat and every pontoon raft shall be equipped with

"(a) A life line becketed around the outside.

"(b) A sea anchor.

"(c) A painter.

"(d) A vessel containing one gallon of vegetable or animal oil. The vessel shall be so constructed that the oil can be easily distributed on the water and so arranged that it can be attached to the sea anchor.

"(e) A water-tight receptable containing two pounds avoirdupois of provisions for each person, except on vessels navigating fresh water.

"(f) A water-tight receptacle containing one quart for each person, except on vessels navigating fresh water.

"(g) A number of self-igniting 'red lights' and a water-tight box of matches.

"Fourth, All loose equipment must be securely attached to the boat or pontoon raft to which it belongs."

in whole or in part by steam or by any other form of mechanical or electrical power shall be considered a steam vessel within the meaning of and subject to all provisions of this Act." We can share with Judge Holtzoff the feeling that a definition of this kind in terms of that which it is not is, without "doubt * * * not the most artistic type of legislative draftsmanship * * *." But as did he, we conclude that "Nevertheless, the Congress has a right to legislate by definition if it chooses" and having done so, §361 incorporates for motor vessels "subject to inspection"[19] the requirements of §481. *Ace Waterways, Inc. v. Fleming*, S.D.N.Y., 1951, 98 F.Supp. 666, 1951 AMC .....

But whether, strictly speaking, this is a "vessel subject to inspection" is a much more difficult matter. Without examining the exact terms of the Coast Guard regulations in force in 1957, the current regulations §§90.05-1[20] and 24.01-1 et seq[21] by Tables 90.05-1(a) and 24.05-1(a) put in the category of "vessels subject to provisions of subchapter C—uninspected vessels" motor powered vessels not exceeding 300 gross tons or over 15 gross tons.[22] The Tables distinguish between steam and motor powered vessels over 65 feet in length. If steam powered, none are exempt as uninspected vessels (column 6) and all are subject to inspection

[19] The 1959 Amendments to §481 are likewise limited to "Vessels subject to inspection and certification," see note 17, supra.

[20] Subchapter I Cargo and Miscellaneous Vessels, Title 46 C.F.R. revised as of January 1, 1963.

[21] Subchapter C—Uninspected Vessels.

[22] This assumes, of course, that such motor vessel is not a tank vessel (column 3), a passenger vessel (column 4) and not a vessel carrying dangerous cargoes, 46 C.F.R. Part 98 or 146 or carrying freight for hire.

(column 5) if not otherwise subject (columns 3 and 4). As to motor powered vessels, however, whether under 15 gross tons or between 15 and 300 gross tons, they are exempt (column C).[23] This administrative classification certainly seems at odds with Judge Holtzoff's thesis in *Ace Waterways*. From our untutored vantage, the only basis for distinction is 46 USCA §367 which extends steam vessel inspection requirements to "sea going vessels of three hundred gross tons and over" when motor powered. The basis for distinction Judge Holtzoff rejected. 98 F.Supp. 666, 668.

It would take a better juridical radar-eye than we now have to penetrate this legislative-administrative fog. We should in any event "navigate with caution." *Cf.* Rule 16, 33 USCA §145n.

For the purposes of our case we do not think that time is at hand to unravel this legislative hodgepodge. *Cf. McConville v. Florida Towing Corp.*, 5 Cir., 1963, 321 F.2d 162, 168 n. 9, 1963 AMC 1456. This is so because we are of the firm view that with or without statutory requirement and wholly independent of Coast Guard regulations, no vessel putting to sea in the open waters of the Gulf of Mexico on a voyage which will put the ship as much as 12 hours from shore in December is seaworthy unless it has at least one lifeboat suitably equipped. Likewise, for the lifeboat to be suitably equipped—that is seaworthy—it must have a mast with suitable sail and gear, bailers, a painter, sea anchor,

[23] They are not exempt if they are tank vessels, or carrying passengers, freight, or certain dangerous cargoes. (See note 22, supra).

rudder and tiller, distress signals and, above all, fresh water and provisions in sealed watertight containers. And since none of these is of any value when lost overboard if the lifeboat capsizes or is swamped in launching, it is essential that these items be lashed or tied or otherwise stowed to prevent such loss.

This represents no intrusion into the legislative domain and certainly not in maritime matters where most of the controlling law has been and still is judge-made. Far from an innovation, failure of an admiralty court at this day and time to recognize the imperative necessity for a suitable lifeboat on an ocean-going vessel would put it completely out of step with the times. Indeed, a court would be at least 75 years behind the times.[24]

If—and there is really no if—an admiralty court either on "notions of ordinary prudence implicit in the concept of due care or the exacting standards of seaworthiness [may] call for an owner to supply more than the bare facility exacted by statutory or regulatory law," *Schlicter v. Port Arthur Towing Co.*, 5 Cir., 1961, 288 F.2d 801, 804, 1961 AMC ...., it is self-evident that such a court can draw on statutory policies to fashion a like or suitable standard to fill an obviously unintended gap or to give full voice to a clear legislative purpose to protect life and limb *Cf. Lincoln Mills v. Textile Workers Union*, 5 Cir., 1956, 280 F.2d 81, 89, 92-93 (dissenting opinion), reversed, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. What—and all—we do is to

[24] §481 is the successor to R.S. §4488 (1875) and the earlier Act of February 28, 1871, §52, ch. 100, 16 Stat. 455.

bring the maritime law abreast the minimum legislative demands for lifesaving equipment for a vessel which ought not to be but is in fact a sea-going ship. See note 18, *supra*. The 1963 Coast Guard regulations in Table 94.20-10(a) requires all of the equipment, and more, called for in the 1954 regulations. §94.20-5(d) likewise requires that "loose equipment, except boathooks in lifeboats, shall be securely attached to the lifesaving appliance to which it belongs." And §94.20-15 describes in detail the (a) bailer, (d) bucket, (w) oars, (r) locker, (s) mast and sail, (z) painter, (bb) provisions, (cc) rowlocks, (jj) water, (1) 3 quarts per person, (2) "the drinking water containers shall be stowed in drinking water tanks, lockers, or other compartments providing suitable protection" and the like.

No difficulty is presented as to the proof of unseaworthiness from the inadequate equipment of the lifeboat. The master did testify that after the capsizing there were three oars left and at least two oarlocks, and that from an earlier casual inspection in port he had observed that it contained at least a water breaker and perhaps a bread breaker. The Judge in his supplemental opinion stated, "The evidence is not entirely satisfactory as to what provisions and equipment the lifeboat carried. * * * Captain Wickizer thought, though he was not absolutely positive that there were oars, oarlocks, water breaker and what looked like a bread breaker in the boat." On this deficiency of proof he found no lack of due care or unseaworthiness. But this was to reverse the tables. It was on the tug-owner-petitioner to prove that the lifeboat was adequate, hence

seaworthy. The doubt reflected by the District Judge means the petitioner failed to establish his right to limit liability. The claimants, on the other hand, adequately carried their burden because it was uncontradicted that when the lifeboat capsized, all of the provisions and fittings other than three oars and two oarlocks were lost. Perhaps even more critical, there was no mast with sails, an appliance so badly needed and which this close to shore would have likely shortened the time in the lifeboat and enhanced the chance of survival.

The case therefore requires as a matter of law a finding of unseaworthiness of tug and lifeboat with the privity and knowledge of the tug owner as to the injury claims. So does it as to the death claims and the claim for conscious pain and suffering prior to death. There may be, of course, questions, oftentimes troublesome, as to whether death actions are under the Death on the High Seas Act, 46 USCA §761, the survival provisions of the Jones Act, 46 USCA §688, 45 USCA §§51, 59, or the local Florida Death Act, Fla.Stat.Ann. §768.01, see *Emerson v. Holloway Concrete Prod. Co.*, 5 Cir., 1960, 282 F.2d 271, 278, 1960 AMC .... (dissenting opinion), and whether a claim for death due solely to unseaworthiness survives, *Falls v. Esso Standard Oil Co.*, 5 Cir., 1961, 397 F.2d 411; 417 n.7, 1961 AMC 66. But we eliminate all of these difficulties by also holding that, as a matter of law, the unseaworthiness of the RALPH E. HAVENS and her lifeboat was occasioned "in whole or in part from the negligence" of the shipowner thus putting the cause of action under the Jones

Act. *Vickers v. Tumey Towing Co.*, 5 Cir., 1961, 290 F.2d 426, 429-32, 1961 AMC ....; *Cox v. Esso Shipping Co.*, 5 Cir., 1957, 247 F.2d 629, 637, 1957 AMC ....; *Michalic v. Cleveland Tankers*, 1960, 364 U.S. 325, 81 S.Ct. 6, 5 L.Ed.2d 20, 1960 AMC 2251.

The result is that the decree of exoneration and limitation of liability must be set aside, and on the remand the District Court is directed to enter appropriate decrees denying the right to limit liability, holding the petitioner-tugowner liable for personal injury and death claims as a result of the negligent unseaworthiness of the Tug RALPH E. HAVENS, her lifeboat and its equipment and fittings. This will leave nothing but the question of ascertaining the nature and extent of the damages and the awards to be made therefor.[25]

REVERSED AND REMANDED WITH DIRECTIONS.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

[25] As our decision recognizes a right of action on behalf of Kelly and his survivors for conscious pain and suffering as well as other injuries sustained while still alive in the lifeboat, and also for his resulting death, we think any additional allowance for his alleged injuries in launching the lifeboat would be relatively *de minimis*. The effect is that, to this very limited extent, we affirm that portion of the District Court's decree.

of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions for further proceedings in accordance with the opinion of this Court.

It is further ordered and adjudged by this Court that the petitioner-appellee, Arthur E. Harris, d/b/a Arthur Harris Marine Towing, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Original Opinion of the District Court

AINSWORTH, District Judge:

The tug RALPH E. HAVENS sank in the Gulf of Mexico during heavy gales. Two of the four crew members died in the catastrophe. The owner of the tug petitions this court for an exoneration from, or limitation of liability, pursuant to General Admiralty Rules 51-54 and 46 U.S.C. 183-189. One of the survivors and the heirs of two other deceased crewmen filed claims and answers herein opposing the petition. The court finds that the tug RALPH E. HAVENS sank as a result of a severe and unexpected storm. Exoneration is therefore granted.

Exoneration from liability is allowed when the loss is not caused by unseaworthiness or negligence. Specifically, acts of God and perils of the sea do not render a shipowner liable for losses resulting there-

from. See 46 U.S.C. § 192; *The Ariel*, S. D. N. Y., 1940, 33 F. Supp. 573, aff'd 2 Cir., 1941, 119 F. 2d 866.

Trial of the issue of liability only was held and the following facts were elicited.

In the late afternoon of December 8, 1957, the HAVENS was proceeding without tow up the western side of the Florida peninsula. Its destination was the entry point of the eastern end of the Gulf Inland Waterway at Carrabelle, Florida. It is therefore necessary when coming from Virginia to Louisiana, the original route of the HAVENS, to follow the west coast of Florida up to Seahorse Whistle Buoy and then cross approximately 90 miles of open Gulf to Carrabelle. It was in this open stretch of Gulf that the HAVENS encountered the storm that sank her.

About two hours after leaving Seahorse Whistle Buoy the HAVENS received a weather report forecasting "fresh" northwesterly winds for later that night or early the next day. At the time the captain of the HAVENS received this report there was a moderate southwesterly wind and the sea was smooth. The captain, who had made this crossing on ten or twelve previous occasions, decided that it was safe to proceed. In view of the weather reports and the captain's experience, we cannot say that this was a negligent decision. Undoubtedly if the captain knew then what he later knew, he would have turned back; however, decisions of navigation have to be made on the basis of information available at the moment. Subsequent unexpected events do not

render a past decision negligent, if that past decision was prudent in the light of facts known at the time.

A tug captain is charged with knowledge of storm warnings posted by the Weather Bureau, *The Golden Rule,* 1925 A.M.C. 297, aff'd 2 Cir., 1922, 278 F. 1021, but here the official weather report was "fresh" northwesterly winds, 17 to 21 knots, which in the captain's discretion properly allowed him to proceed. See *The Fred Smartley, Jr.,* 4 Cir., 1939, 100 F.2d 971.

At 1:30 a.m. on December 9 the captain was awakened by the vessel's "jumping and lunging." In order to keep the vessel from "diving" he slowed the engine. The weather worsened rapidly. The captain slowed the HAVENS further. She lost most of her steerageway. Her bow fell off to starboard. A sea struck her port bow. She broached and wallowed in the trough of the seas. Speed was increased but before she could be headed two large waves piled over the port side breaking out the windows of the deckhouse.

The HAVENS took in dangerous quantities of water through the broken windows. A distress signal was sent out, but was not answered. The lifeboat was readied for launching, but the captain stayed at the wheel until the HAVENS' "waist" was nearly awash. He stopped the engine and joined the three crewmen at the lifeboat. At the captain's instructions the men waited until the water reached their feet, then jumped into the lifeboat, but as they jumped the HAVENS sank and the after davit swung out, caught the gunwale of the lifeboat and capsized it.

It was now three o'clock in the morning. After about an hour in the water the crew succeeded in righting and bailing the boat. It was then discovered that all of the supplies and equipment, except the row locks and three oars, had been lost in the capsizing.

After three and a half days of exposure in cold, heavy winds and rough seas the lifeboat was brought to shore near Bayport, Florida. Two crewmen had died. The surviving captain and crewmen were hospitalized and treated for exposure.

Petitioner's claim for exoneration is based upon the contention that the sole proximate cause of the sinking of the tug RALPH E. HAVENS was the unforecasted violence of the gale encountered by the HAVENS. It is true that when a storm is relied upon to explain the sinking of a vessel the storm must be shown to have been of extraordinary intensity. *Sabine Towing Co. v. Brennan*, 5 Cir., 1934, 72 F. 2d 490, 493. However, what constitutes "extraordinary intensity" is a relative matter. The Supreme Court pointed out in *Compania de Navegacion Interior, S. A., v. Fireman's Fund Ins. Co.*, 1928, 277 U. S. 66, that a large ocean-going vessel encountering what to it would be a light breeze could well be an exceedingly dangerous gale to a small, inland, wooden tug. Here we had a small, inland, wooden tug that encountered waves of 12 to 13 feet, which must surely constitute a storm of "extraordinary intensity" to such a vessel.

Claimants' contention that the HAVENS was unseaworthy due to her age and condition is not borne out

by the evidence. Although she was 52 years old at the time of her sinking, she had an excellent inspection and maintenance record. An experienced marine surveyor who had personally examined the HAVENS on three different occasions in 1956 testified that she was in a sound and seaworthy condition. Claimants' countering evidence was of an abstract nature concerning the general effect of age on wooden vessels. Age alone does not establish unseaworthiness; it is but one factor to consider.[1]

Was the HAVENS improperly equipped? No, for the following three reasons:

(1) She had four bilge pumps as follows: (a) A 1-inch centrifugal pump which operated off the flywheel of the main engine had been installed only five days before the sinking. This pump had been tested and was working properly before the storm. (b) A 2-inch fire and bilge pump which was operated by a 10 hp. auxiliary diesel engine. (c). A 1-1/2-inch gasoline powered pump which had been permanently installed on a rack aft of the deckhouse and provided with a canvas cover. (d) A 2-inch portable gasoline pump with a flexible suction and discharge hose which could be moved about and used anywhere. During the trip down from Virginia, petitioner, as an added precaution, had the portable pump moved into the engine room where it would be kept dry and would be available in case of emergency.

[1] Compare *Petition of Cherikee Trawler Corporation*, E. D. Va., 1957, 157 F. Supp. 414, 418.

(2) The location of the bilge pumps' suction strainers did not render the vessel unseaworthy and the bilges were not unusually dirty. There is no dispute that the strainers were located in such a way that they could not be cleaned while the drive shaft was revolving. However, the bilges were, according to the testimony, reasonably clean and routinely inspected for cleanliness. The fact that the drive shaft had to be stopped is not per se negligence, for this type of maintenance is usually performed in the safety of a harbor.

It was unconvincingly contended by claimants that the bilge strainer was made up of ordinary household mosquito screening. If proven, this could be unseaworthiness since the strainer would probably become clogged whenever heavy seas were encountered and thus necessitate stopping the engine. However, we conclude from the testimony that the bilge strainer was not constructed of household mosquito screening and that the bilges were not filled with muck and debris; therefore, the location of the bilge pumps' suction strainer did not cause the HAVENS to be unseaworthy.

(3) The window panes were of a type standard on such vessels as the HAVENS. Two marine surveyors testified that the windows on the HAVENS were of the type found on over ninety per cent of similar vessels.

It is undoubtedly true that if those window panes had been of a stronger type, they would not have broken. The HAVENS would have shipped less water

when she broached, would have been less "loggy" and possibly might not have sunk. This "for want of a nail" argument does not establish unseaworthiness, however.

An owner is not required to equip his tug with the latest devices conceivable, but only such as are reasonably required for the vessel's purpose. The standard of reasonableness will be influenced by comparison with similar vessels.[2]

Claimants' contention that the captain was negligent in slowing the HAVENS, thereby causing her to broach, was not proven. The captain admittedly slowed the HAVENS. His purpose was to keep her from "diving" in the heavy seas. It is well recognized that it is good seamanship to slow down a small vessel as much as possible when proceeding in heavy seas, keeping only enough steerageway to prevent broaching. As the speed decreases, the possibility of broaching increases. This is a judgment that the captain in such a circumstance must make. A mistake in judgment when viewed from the vantage point afforded by hindsight is not to be imputed as a fault.[3]

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[2] Compare *Pinion v. Mississippi Shipping Company*, E. D. La., 1957, 156 F. Supp. 652; *The New York*, 2 Cir., 1913, 204 F. 764; *Doucette v. Vincent*, 1 Cir., 1952, 194 F. 2d 834; *Johannesen v. United States*, E. D. N. Y., 1956, 136 F. Supp. 786; *Rodriguez v. The Angelina*, D. C. P. R., 1959, 177 F. Supp. 242; and *Fox v. The SS Moremacwind*, E. D. Va., 1960, 182 F. Supp. 7, aff'd 4 Cir., 1960, 285 F. 2d 222.

[3] *The Mary T. Tracy*, S. D. N. Y., 1920, 298 F. 528, 530; *The Imoan*, 2 Cir., 1933, 67 F. 2d 603, 605; *The Fred Smartley, Jr.*, 4 Cir., 1939, 100 F. 2d 971, 974; *Green v. Crow*, 5 Cir., 1957, 243 F. 2d 401, 403, ". . . an honest error in judgment by the navigator is not to be imputed as a fault . . . ."; *Boudoin v. J. Ray McDermott & Company*, 5 Cir., 1960, 281 F. 2d 81, 84; and *Maroceano Compania Nav. S. A. of Pan. v. City of Los Angeles*, S. D. Cal., 1961, 193 F. Supp. 529, 532.

At the trial, claimants objected to the admissibility of the deposition of the HAVENS' captain, WICKIZER, on the ground that claimants were not allowed access to a written statement given by the captain to the petitioner. The deposition was taken after due notice more than six months after the accident and more than four years prior to trial. Claimants were given and exercised full opportunity of cross-examination. See *Hoffman v. Chesapeake and O. Ry. Co.*, N. D. Ohio, 1947, 7 F. R. D. 574, 575. No showing of "special circumstances" or "good cause" for the production of the statement was made. *Hickman v. Taylor*, 329 U. S. 495 (1947).

There is an important distinction between calling for a statement at a deposition and calling for a statement at a trial during cross-examination. After an adverse witness has testified at the trial, opposing counsel, in order to effectively cross-examine, may be entitled to see and use previous statements of the witness.[4] However, the court, upon motion of the claimants, has examined the previous statement of the witness, WICKIZER, and finds that the witness' statement is substantially the same as his testimony on deposition. The statement is herewith placed in evidence by the court. The objection to the admissibility of the deposition of the witness, WICKIZER is denied.

The final matter for consideration is the additional claim of the survivors of the deceased seaman for in-

[4] Claimants rely upon *United States v. Matles*, E. D. N. Y., 1957, 154 F. Supp. 574, which is based upon the Jencks rule and not applicable here in this suit between private parties.

juries sustained when he was launching the lifeboat. The court has thoroughly explored the testimony and finds that the evidence indicates a great deal of confusion and expected excitement in the launching and ultimate capsizing of the lifeboat, but no negligence or unseaworthiness.

For the foregoing reasons the petition for exoneration of liability is GRANTED.

Supplemental Opinion of the District Court

This cause came on for hearing on a former day on motion of claimants for a new trial, rehearing or, alternatively, reopening of the case.

The court, having heard the argument of counsel and having studied the briefs in support thereof, is now ready to rule:

IT IS ORDERED that motion of claimants be, and the same is hereby, DENIED.

REASONS

In our original opinion we found as a fact, based on the record as a whole, that the HAVENS was slowed down in order to keep the vessel from "diving" and further that the captain's decision to do so, in the light of the events at the time, was not negligence.

We also found that the vessel was seaworthy and that the weather encountered was of extraordinary

intensity. The HAVENS had made this same trip in safety before, apparently without incident. No small craft warnings were forecasted and the captain had every right to assume that he would not encounter weather dangerous to the safety of his vessel. The trip would not require the HAVENS to be more than a 12-hour run to a safe port. The unexpected and unforecasted encounter with 12- to 13-foot seas sank the HAVENS. (According to the Bowditch Scale this constituted a strong gale.) So, unless all Gulf crossings by inland tugs at this point (Seahorse Reef Buoy to Carrabelle, Florida) are prohibited the captains of such vessels can only proceed on the basis of information available to them, and to do so is not negligence where the forecast weather is good, and to be unable to weather 12- to 13-foot seas under the circumstances here does not render the vessel unseaworthy.

There was no Coast Guard regulation requiring this type of boat to carry a lifeboat. But it did have one, as well as life preservers, which the crew used. The evidence is not entirely satisfactory as to what provisions and equipment the lifeboat carried. The lifeboat capsized at launching because of heavy seas and whatever was in it was washed away before the crew could right the boat. Captain Wickizer thought, though he was not absolutely positive, that there were oars, oarlocks, water breaker and what looked like a bread breaker in the boat. All of this was lost when the lifeboat overturned at launching. We find no lack of due care or unseaworthiness under all circumstances which prevailed.

The court found that no negligence or unseaworthiness existed in the launching and ultimate capsizing of the lifeboat. The crew did the best they could under the prevailing circumstances, where the wind and the waves were rapidly sinking their vessel, and great difficulty was experienced in launching the boat under these severe circumstances.

The evidence as to possible injury to seaman Kelly is so vague and uncertain as to make it impossible for us to predicate an award. Walker testified that Kelly fell back and hurt his back when the rope on the lifeboat broke. He said that Kelly got up, rubbed his back, which appeared to be red, and that he helped him into the lifeboat. He does not otherwise describe his alleged injury and we do not know for certain that he was injured or the extent thereof. We deem Walker's testimony on this point wholly inadequate. We cannot make an award on this kind of evidence.

As to the alleged error in the court's refusal to reopen the case to permit claimants to cross-examine Captain Wickizer and the alleged error in the court's admitting the Wickizer deposition, it is repeated that the deposition was taken more than four years prior to trial. We realize that the Wickizer deposition was taken for use at the trial and not for discovery. However, claimants made no motion for production of the statement at any time until the trial itself was in progress. In an abundance of caution the court examined the statement of Captain Wickizer after trial but in our opinion there were no matters therein suf-

ficient to cause reopening of the case. The court admitted the statement into evidence so that claimants might have a complete record for purposes of appeal and to show no prejudice had resulted. The statement was not otherwise considered as evidence by the court. It was unnecessary to do so. Wickizer's deposition set forth his version of what had happened. Effective administration of the trial procedure requires that the trial court must have discretion at some point to say finis.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 487

ARTHUR E. HARRIS,
Petitioner,

versus

WILLIAM F. WALKER, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Despite the petitioner's efforts to characterize the instant appellate opinion as contrary to opinions of other Courts of Appeals and to clothe the decision with national significance, respondents submit that all the United States Court of Appeals for the Fifth Circuit has done in the instant case is to apply well-established principles of maritime law to the facts as determined by the Trial Court.

1. IF A VESSEL DOES NOT WITHSTAND THE USUAL AND CUSTOMARY WEATHER ENCOUNTERED IN HER TRADE SHE IS PRESUMPTIVELY "UNSEAWORTHY". *States Steamship Company v. United States* (9 Cir., 1958) 259 F.2d 458, *cert. denied* 3 U.S. 933, *rehearing denied* 359 U.S. 921; *The Cleveco* (C.C.A. 2nd, 1946) 154 F.2d 605; *Sabine Towing Co. v. Brennan* (C.C.A. 5th 1934) 72 F.2d 490, *cert. denied* 293 U.S. 161, *rehear-*

ing denied 293 U.S. 562; *The Rosalia* (C.C.A. 2nd, 1920) 264 F. 285.

In applying this settled principle of admiralty law to the facts of this case, the Court of Appeals has merely held that, as a matter of law, the burden of showing that an *unusual or uncustomary* hazard befell the Tug RALPH E. HAVENS was upon the petitioner and that the petitioner completely failed to carry this legal burden of proof.

Petitioner's authorities hold only that a vessel need not be perfect or able to survive *all* storms in order to be seaworthy. While the cases cited by petitioner in support of this proposition do not involve vessel sinkings, even if they did, they are in nowise at variance with the appellate opinion below. Nowhere in that opinion is it held, nor have your respondents at any time suggested, that Petitioner's 52 year old wooden hull "inland" tug should have been able to withstand *all* weather.

All that the Court below has held is that the tug's legal obligation of seaworthiness to its seaman was to be able to survive the customary and usual weather common to the Gulf of Mexico in December. By the Petitioner's own evidence, it is uncontradicted that the weather encountered by the RALPH E. HAVENS on the fatal night was neither *unusual* nor *uncommon*; it is likewise indisputable that the vessel did not survive that weather.

2. IN ORDER TO BE SEAWORTHY, A VESSEL MUST BE EQUIPPED WITH REASONABLY ADEQUATE LIFESAVING DEVICES. *The Carroll* (D. C., Md., 1932) 60 F.2d 985.

The Court of Appeals in the decision below has taken great pains not to hold that petitioner's tug was in violation of any applicable Coast Guard regulations relating to lifesaving equipment. All the Court has held is that, regardless of its size and class, a vessel which goes to sea is a "seagoing vessel", and that the test of "reasonable fitness" must be applied in the light of the actual use to which the vessel is put by its owner. *Mitchell v. Trawler Racer, Inc.* (1960) 362 U. S. 539.

Confronted with the undenied and undeniable fact that two crewmen perished due to exposure and lack of lifesaving equipment, the Court below has, once again, only held, as a matter of law, that the petitioner did not sustain its burden of showing that its *de facto* seagoing vessel met the acceptable standards of reasonable fitness *quoad* its lifesaving devices.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there is no justification for the issuance of a *writ of certiorari* in this case and that the petition therefore should be denied.

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October, 1964

CERTIFICATE OF SERVICE

I, Samuel C. Gainsburgh, having been admitted to practice before this Honorable Court on the 9th day of February, 1955, do hereby certify that copies of the above and foregoing brief in opposition to the petition for certiorari have been served upon the petitioner by mailing the same to Eberhard P. Deutsch, Esq., c/o Deutsch, Kerrigan & Stiles, Attorneys at Law, Hibernia Bank Building, 812 Gravier Street, New Orleans, Louisiana, 70112, first class, postage prepaid, at New Orleans, Louisiana, this ___ day of the month of _____, 1964.

Samuel C. Gainsburgh
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